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Supreme Court of the United States

October Term, 1955

No. 536

LADY NELSON, LTD., and CANADIAN NATIONAL (WEST INDIES) STEAMSHIPS LTD.,
Petitioners,

against

CREOLE PETROLEUM CORPORATION and BARGE 75-8,
Respondents.

CREOLE PETROLEUM CORPORATION,
Respondent,

against

LADY NELSON, LTD., and CANADIAN NATIONAL (WEST INDIES) STEAMSHIPS LTD.,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EUGENE UNDERWOOD,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Lady Nelson, Ltd. and Canadian National (West Indies) Steamships Ltd. pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on July 5, 1955.

Citations to Opinions Below

The opinions of the Court of Appeals are reported in 224 F. 2d 591, and are printed in the Appendix hereto, *infra*, pages 18 *et seq.*, and in the record (R. 136).

The opinion, findings and conclusions of Noonan, J. in the District Court, not officially reported, are reported in 1954 A. M. C. 1279, and are printed in the record (R. 123).

Jurisdiction

The judgment of the Court of Appeals was entered on July 5, 1955 (R. 147). Re-hearing was denied on September 21, 1955 (R. 160). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Question Presented

Is a steamship, which meets and safely passes well clear of a tug, liable for colliding, on a dark night, with a low-lying, unlighted barge being towed astern of the tug, where the tug's lights affirmatively represent that she has nothing in tow, and the unlighted barge is not visible in the darkness until a few seconds before the collision?

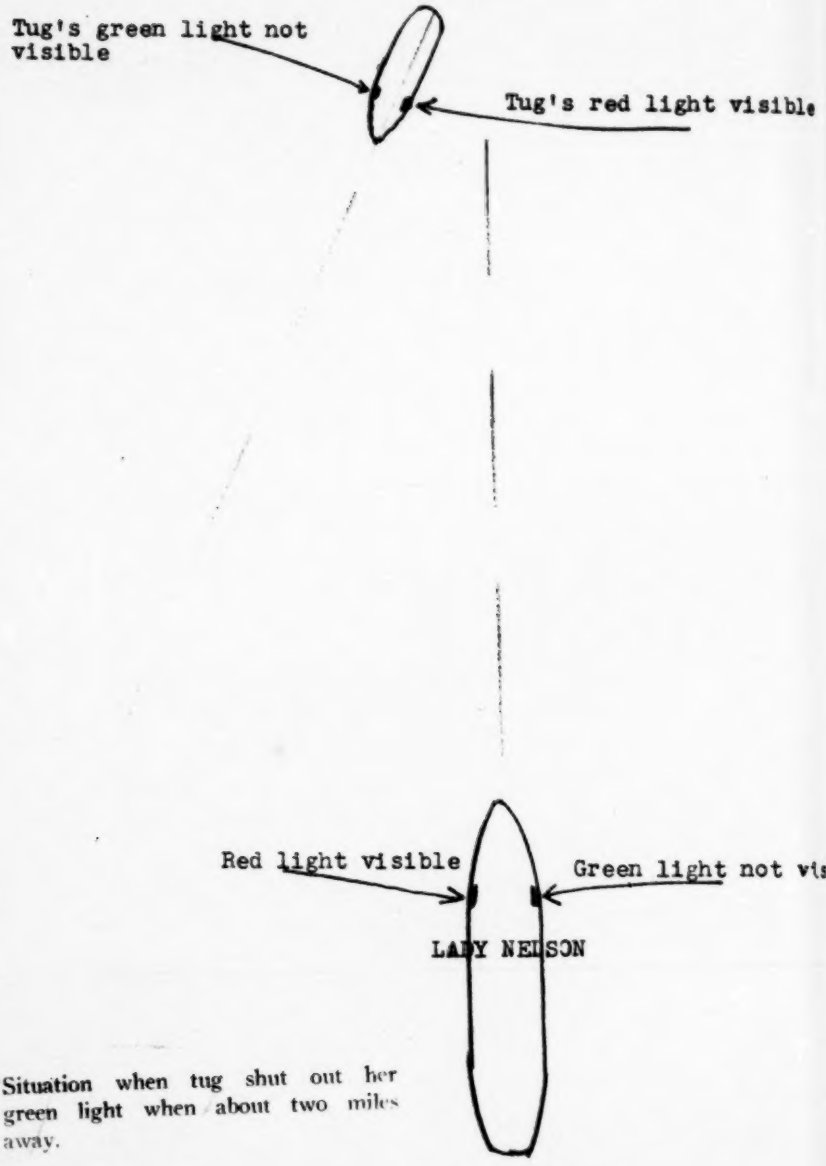
Statute Involved

The applicable section of the International Rules for the Prevention of Collisions at Sea, Article 18, is 33 U. S. Code, § 103. It is printed in the Appendix hereto, *infra*, page 28.

Statement

On a dark night in April, 1951, in British waters, the Canadian steamship LADY NELSON met, on substantially parallel opposite courses, Venezuelan tug ANA MATHILDE towing Venezuelan tanker barge 75-8 astern on a hawser. The barge, being fully loaded, extended only 18 inches above the surface of the water and was entirely without lights. The tug carried red and green side lights on her port and starboard sides respectively. These are carried by all powered vessels. She also carried one white light, the prescribed signal for a vessel proceeding alone, without a tow. The prescribed signal for a vessel towing another vessel astern is two white lights, one above the other—but the tug carried only one. Soon after her lights were sighted by those in charge of the LADY NELSON the tug changed course to her right, i.e. away from the projected course of the LADY NELSON. This was at once known aboard the LADY NELSON because the change had the effect of obscuring the tug's green side light and this obscuration was observed by those in charge of the LADY NELSON's navigation. From that moment on the vessels' projected courses did not intersect, as appears from our diagram on page 4. The LADY NELSON continued on and passed the tug without incident or difficulty at a safe distance. Shortly thereafter the unlighted, low-lying barge in tow of the tug appeared directly ahead of the LADY NELSON and so close that collision ensued within a few seconds.

Petitioners filed their admiralty libel against the owners of both tug and barge *in personam*, and against both vessels *in rem*. Process could not be served on the tug or her owner and the case proceeded to trial against only the barge *in rem* and her owner, Creole Petroleum Corporation, *in personam*. The cross libel of Creole, respondent in this Court, against petitioners to recover its damages as owner of the barge and her cargo was tried at the same time.



Situation when tug shut out her green light when about two miles away.

NOT TO SCALE

The District Court found that the barge had no lights whatever and that the tug, instead of carrying two white lights, as is required of a tug towing another vessel astern, carried only one white light, the established signal for a vessel proceeding without any tow. Respondent *in personam* and the barge *in rem* were held at fault because of the barge's failure to carry any light. The District Court also held the tug at fault for failing to carry the required second white light, and for not putting a light on the barge, but this was ineffective because neither the tug nor her owner was before the Court. The Court held that the LADY NELSON was free from fault, finding that she kept a proper lookout, and that she was entitled to rely on the tug's single white light as establishing that the tug had no tow and to continue on and pass the tug, as she did, at a safe distance.

The Court of Appeals held, sustaining the District Court, that the LADY NELSON was not at fault vis-a-vis the barge because she was entitled to navigate on the assumption that there was no barge, the barge being invisible in the darkness and the tug's single white light representing that there was no tow. However, two of the Court of Appeals, Hastie and Frank, C. JJ., with Clark, C. J. dissenting vigorously, reversed the District Court and held that Article 18 of the International Rules required the LADY NELSON to pass the tug by a wider margin than she did in order to avoid risk of collision and that, because of this fault vis-a-vis the tug, and although she was blameless vis-a-vis the barge directly, the LADY NELSON must divide the damages with the barge.

In his dissent Clark, C. J. held that Art. 18 did not require the LADY NELSON to pass the tug by a wider margin than she did, and that the doctrine put forward by the majority "will surely both confuse and burden our merchant marine" (*infra*, p. 25).

Specification of Errors to Be Urged

The Court of Appeals erred:

1. In holding that the LADY NELSON, although blameless vis-a-vis the barge, must nevertheless divide the damages with her.

2. In holding that Article 18 of the International Rules required the LADY NELSON to change her course.

3. In reversing the District Court on the facts although its findings were not clearly erroneous.

4. In applying notions of American law to a collision between foreign flag ships in British waters.

REASONS FOR GRANTING THE WRIT

I. Conflict with accepted principles of tort law as to liability to the "unforseeable" plaintiff, and particularly with a decision of the Court of Appeals for the Third Circuit.

The decision of the majority is, as it confesses, in conflict with "the controlling principle" that "If the reason why the defendant's act was negligent was that an injurious result might happen in a particular way or to a particular thing, he may not be liable if the event happens by different means or to a different subject matter." The majority cites for "the controlling principle", which it negates, *The Eugene F. Moran*, 212 U. S. 466, and *Diamond State Tel. Co.* v. *Atlantic Refining Co.*, 205 F. 2d 402, 3 Cir., both admiralty cases, and *Palsgraf* v. *Long Island R. R. Co.*, 248 N. Y. 339, and *Seavey, Cogitations on Torts*, 1954, p. 32 (*infra*, p. 22).

In *The Eugene F. Moran, supra*, this Court considered and, as has been thought, settled the precise question in a collision case involving lights, saying:

> "When a duty is imposed for the purpose of preventing a certain consequence, a breach of it that

> does not lead to that consequence does not make a defendant liable for the tort of a third person merely because the observance of the duty might have prevented that tort" (p. 476).

In *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U. S. 303, where a time charterer sought to recover from a shipyard its damages resulting from loss of the use of the vessel due to the negligence of the shipyard this Court said:

> "* * * no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. See Savings Bank v. Ward, 100 U. S. 195. The law does not spread its protection so far. A good statement, applicable here, will be found in Elliott Steam Tug Co. Ltd. v. The Shipping Controller, [1922] 1 K. B. 127, 139, 140. Byrd v. English, 117 Ga. 192. The Federal No. 2, 21 F. (2d) 313" (p. 309).

The decision of the majority is in direct conflict with the decision of the Court of Appeals for the Third Circuit in *Diamond State Tel. Co.* v. *Atlantic Refining Co.*, 205 F. 2d 402. There steamship ATLANTIC struck a submarine cable which had been lifted from the bottom and was being repaired by the barges ACCO and CONTRACTOR assisted by tug ADRIATIC. The two barges and the tug displayed many lights but did not show the lights required to be carried by vessels repairing submarine cables. Steamship ATLANTIC, proceeding up the Delaware River, was, as the Court found, negligent vis-a-vis the barges and the tug. However, she avoided collision with them and struck only the cable. The Court of Appeals considered the precise tort law question decided in the case at bar, held that the ATLANTIC had violated no duty to the cable or its owner, could not reasonably foresee the cable's presence, and held that the ATLANTIC was not liable for the damage done to the cable despite her

negligence vis-a-vis the barges and the tug. A more diametric conflict than the one between that case and this is difficult to imagine.

What has happened here is made plain by the majority's reference to the dissenting opinion of Frank, C. J. in *Hentschel* v. *Baby Bathinette Corp.*, 215 F. 2d 102, 2 Cir. Hastie, C. J., who wrote the majority opinion in the case at bar, dissented in *Diamond State Tel. Co.* v. *Atlantic Refining Co., supra,* and Frank, C. J., who voted with Hastie, C. J. in the case at bar, dissented in *Hentschel* v. *Baby Bathinette Corp., supra.* By a peculiar concatenation of circumstances a dissenting judge from the Third Circuit and a dissenting judge from the Second Circuit chanced to be the majority in this case involving the same point and were in a position to impose their minority view and did so.

The following are a few of the many cases with which the decision of the majority also conflicts: *Union Carbide & Carbon Corp.* v. *Peters,* 206 F. 2d 366, 4 Cir.; *Foreman* v. *Texas & New Orleans R. Co.,* 205 F. 2d 79, 5 Cir.; *States S. S. Co.* v. *Rothschild International Stevedoring Co.,* 205 F. 2d 253, 9 Cir.; and *Rosen* v. *Bronx Hospital,* 308 N. Y. 925.

Whether possible negligence of the LADY NELSON be considered in terms of breach of duty or in terms of foreseeability the decision of the majority below is flagrantly at variance with a great preponderance of authority in both Federal and State Courts throughout the land. The authorities are painstakingly reviewed by Professor William L. Prosser, author and Dean of the Law School, University of California, in *Palsgraf Revisited,* 52 Michigan Law Review, 1 (November, 1953). Professor Prosser concludes that there must be, to constitute a tort, "some reasonable connection between the original negligence and its consequences, between the harm threatened and the harm done" (*id.*, p. 32). The harm done was the collision with the barge but no such harm threatened because the barge's presence was unknown.

The *Restatement* of *Torts* states the rule to be that there is no duty to the unforeseeable plaintiff. *Restatement, Torts,* § 281, Comment c. See also *Prosser's Law of Torts,* 2nd Edition, 1955, pp. 168 *et seq.* This must be so in the case at bar because the barge carried no light and the tug's single white light was a warranty that there was no unforseeable plaintiff in tow behind her.

Considered in terms of breach of duty the LADY NELSON committed no tort as to the barge because she owed her no duty. She had no notice the barge was there and the tug's lights affirmatively represented that there was none. It is inconceivable that there was a duty to a non-existent barge; hence there was no breach.

Considered in terms of foreseeability the LADY NELSON committed no tort as to the barge. No matter how close she passed the tug, collision with the barge was altogether unforeseeable because the barge carried no light, her presence was not known and the tug's lights said she had no tow.

II. Conflict with prior decisions as to the right to rely upon the truth of navigation lights displayed by others.

The majority held that, although the barge was unlighted and the tug's lights indicated that she had no tow, the LADY NELSON was bound to give the tug a sufficiently wide berth to allow for the contingency that she might nevertheless have an unlighted tow (*infra,* p. 23). This is in sharp conflict with prior decisions.

In *Casement* v. *Brown,* 148 U. S. 615, a vessel hit a submerged, unlighted pier which, however, the pilot knew was there. This Court exonerated the vessel saying:

> "* * * it would be placing too severe a condemnation on the conduct of the pilots in charge of the boats, to say that their error or judgment, their de-

> pendence on the appearance of the stream, and their reliance upon the duty of the defendants to place suitable buoys or other warnings, was such contributory negligence as would relieve the defendants from liability for the results of their almost confessed, and certainly undoubted, negligence" (p. 627).

In *The Ludvig Holberg,* 157 U. S. 60, this Court said:

> "Had the steamship been apprised of the fact that the tug was encumbered by a tow, there is no doubt that, by putting her wheel hard-a-starboard, she could have avoided the barque; but seeing the tug alone, she was under no obligation to take further precautions than such as were necessary to avoid her" (p. 70).

In *Bradshaw* v. *The Virginia,* 176 F. 2d 526, 4 Cir., certiorari denied, 338 U. S. 892, the Court held that the possible presence of a vessel navigating without lights need not be taken into account (p. 530).

In *The Kaiserin Maria Therese,* 149 Fed. 97, 2 Cir., certiorari denied *sub nomine Palson* v. *North German Lloyd,* 204 U. S. 671, the holding was the same, based upon this Court's decision in *The Scotia,* 14 Wall. (81 U. S.) 170, and a decision of the Circuit Court, Maryland, in *Kennedy* v. *Steamer Sarmatian,* 2 Fed. 911.

It is well settled by a long line of authorities that in shaping her course with reference to others a vessel not only is entitled to but must assume that others are navigating in obedience to the rules. *Griffin on Collision,* § 20, pp. 29 *et seq.*

The four old District and Circuit Court decisions cited by the majority * hold only that vessels must take into

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* *The Aurania and The Republic,* S. D. N. Y. 1886, 29 Fed. 98, 125; *The Majestic,* 2d Cir. 1891, 48 Fed. 730; *The Laura V. Rose,* S. D. N. Y. 1886, 28 Fed. 104; *Robinson* v. *Detroit & C. Steam Nav. Co.,* 6th Cir. 1896, 73 Fed. 883.

account all *apparent* contingencies of navigation. While the tug was apparent there was no contingency with regard to her and she was safely passed. There was no apparent contingency as regards the barge because the tug's lights said there was no barge. *The America*, 92 U. S. 432, holds only that a ship must change course "seasonably" and the event proves that the "season" for the LADY NELSON to change course to avoid collision with the tug never came.

III. Conflict with prior decisions as to the requirements of Article 18 of the International Rules.

The majority, rejecting the fact findings of the District Court (unjustifiably, IV *infra*, p. 13), concluded that the vessels were heading for each other until ship and tug were three-quarters of a mile apart and held the LADY NELSON at fault for not changing her course to the right earlier because it conceived that "risk of collision" existed. Even on these facts the majority's decision conflicts with the decisions of this Court, and the Courts of Appeal for the Ninth and Third Circuits, as to when avoiding action must be taken because there is no evidence that there ever was risk of collision between ship and tug. There was no evidence that the LADY NELSON passed the tug either uncomfortably or unusually close. The District Court found that they passed "without incident or difficulty" (Finding 6, R. 124). As Clark, C. J. said, dissenting:

> "In view of these well supported findings it would seem doubtful that the Lady Nelson could properly be held liable even if we accept the picture of inconsiderate navigation limned in the opinion. For she has completely fulfilled her obligation of 33 U. S. C. § 133 of navigation with respect to an approaching vessel 'so that each may pass on the port side of the other'. * * * The holding otherwise seems somewhat as though a large car approaching a small Ford on a broad highway must climb the greensward to its right for fear there may be an unlighted trailer to the Ford which may get in its path" (*infra*, p. 26).

In *The Wenona*, 19 Wall. (86 U. S.) 41, this Court held that the rules of navigation are not applicable when the vessels "are yet so distant from each other that measures of prevention have not become necessary to avoid a collision" (p. 52).

In *The Scotia*, 14 Wall. (81 U. S.) 170, this Court said that a steamer "is required to take no precautions when there is no apparent danger" (p. 181). This Court also said:

> "It is not the law that a steamer must change her course, or must slacken her speed the instant she comes in sight of another vessel's light no matter in what direction it may be" (p. 182).

In *The Victory and The Plymothian*, 168 U. S. 410, this Court said:

> "So long as the vessels were port to port, the Plymothian, proceeding at moderate speed, was not bound to stop and reverse on the chance that the other vessel might depart from the rules of navigation" (p. 426).

In *Puratich* v. *United States*, 126 F. 2d 914, 9 Cir., the situation was almost the same as that at bar and the Court of Appeals exonerated the CROSBY, which was in the position of the LADY NELSON, holding that even though the clearance might be close, if it is sufficient for the vessels to pass safely port to port Article 18 does not require a change of course.

In *The Atlantic City*, 143 Fed. 451, 3 Cir., the SYLVAN GLEN and the ATLANTIC CITY were on courses to pass each other three hundred feet apart and the ATLANTIC CITY did not change her course. The Court of Appeals said that "the margin of safety was as great as was necessary" (p. 454) and refused to hold the ATLANTIC CITY at fault for not changing her course.

IV. Conflict with the doctrine of *McAllister* v. *United States*, 348 U. S. 19, as to the status of District Court fact findings.

The majority, disregarding this Court's directive in *McAllister* v. *United States*, 348 U. S. 19, as to the stature of admiralty findings, based its view of the LADY NELSON's fault on facts quite different from those found by the District Court. The District Court accepted the testimony of the master and watch officer of the LADY NELSON and found that the tug's green light shut out "soon" after her lights were first seen two and a half miles away (Findings 4-5, R. 124). This can only mean that from the time the vessels were not less than, say, two miles apart they were red to red, *i.e.* their projected headings did not cross; hence there was no danger of collision. The majority, without acknowledging that they were changing the fact findings, and without criticizing the testimony of the master and watch officer, who testified in person at the trial, resorted to the testimony of a passenger who testified by deposition, and who was not charged with any of the responsibilities of navigation, and found that the tug's green light did not shut out until the vessels were three-quarters of a mile apart. The majority made no attempt to show that the District Court's findings were "clearly erroneous". If District Court findings are to have the stature to which they are entitled under *McAllister* v. *United States*, *supra*, the majority erred in reversing them without pointing out wherein they were clearly wrong. If admiralty appeals are not again to become trials wholly *de novo* the action of the majority below should be corrected.

The vice of reversing on the facts, particularly where, as here, no claim was made in the Court of Appeals that the findings were erroneous, is apparent from the egregious mistake made by the majority in attempting to calculate the navigational facts. The majority, having postulated that the tug was showing both side lights to the LADY NELSON until the vessels were three-quarters of a mile apart, were

persuaded that there was risk of collision between ship and tug because it would take the LADY NELSON only two minutes, at her speed, to close that distance. Actually three and a half minutes * were required. If the majority had understood that the vessels were at least three and a half minutes apart when the tug shut out her green light, instead of mistakenly thinking they were only two minutes apart, they would have realized that there was no risk of collision.

V. Conflict with established rules of applicable British law.

The collision occurred in the territorial waters of Trinidad and British law applies (Finding 10, R. 125; Conclusion 3, R. 127). Nevertheless the majority below applied peculiar interpretations of American law.

Under authoritative British decisions the LADY NELSON can not be required to divide the damages with the barge even if the majority's conclusion that she was at fault vis-a-vis the tug be accepted.

The House of Lords and the Court of Appeal have uniformly held that one can not recover for the negligence of another unless such other owes *to him* a duty to exercise care and that harm *to him* was reasonably forseeable. The leading case is *Donoghue* v. *Stevenson*, [1932] A. C. 562 and Lord Atkin's discussion at pages 579-80 is regarding as establishing the accepted doctrine in England today. To the same effect are *Bourhill* v. *Young*, [1943] A. C. 92, 98, 100-1; *Woods* v. *Duncan* [1946] A. C. 401, 443-5; *Heaven* v. *Pender*, [1883] 11 Q. B. D. 503, 509-10; and *Le Lievre* v. *Gould* [1893] 1 Q. B. 491, 496-7.

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* There are 6080 feet in a nautical mile. Three-quarters of a nautical mile equal 4560 feet. At thirteen knots the LADY NELSON would advance 1317.3 feet per minute, or 4610.5 feet in three and a half minutes.

Under authoritative British decisions the LADY NELSON was not required to change her course.

No English Court would interpret the collision rules to require the LADY NELSON to change her course to avoid the unknown barge. It is well settled by the highest authority in England that navigators are not obliged to establish their courses on the basis of supposition but are entitled to proceed on the basis of what is apparent. *The Beryl*, [1884] 9 P. D. 137, 138 (Court of Appeal); *The Bellanoch* [1907] P. D. 170, 192 (Court of Appeal). In *Baker* v. *Owners of the Theodore H. Rand*, 12 A. C. 247, 250, and in *Owners of S. S. Mendip Range* v. *Radcliffe*, [1921] 1 A. C. 556, 581, the House of Lords referred with approval to *The Beryl, supra*. See also *Halsbury's Laws of England*, 2nd Edition, Vol. 30, § 950.

VI. Confusion and doubt cast upon the Collision Rules by the majority's decision.

The decision of the majority below casts grave doubt on the meaning and effect of the Rules for the Prevention of Collisions at Sea and is a matter of serious concern to the maritime industry as a whole. If the decision stands, which of the rules can a master rely upon as effectively controlling the conduct of other vessels? Navigation is a practical science, based upon known criteria, conducted from the bridges of real ships actually at sea. If a master must lay his course upon the assumption that lights of other vessels may be false how much allowance must he make; in what direction—and must he also assume and allow for the possibility that shore lights may be false, or that whistle signals may be false? The usefulness of the Rules is seriously impaired if the decision stands. Clark, C. J., dissenting, realized this fully and wrote:

> "The safe navigation of ships, particularly at night, must depend on the trustworthiness of signals,

> known to mariners and set by law. Any holding which weakens their validity or indeed falsifies their message is disturbing. It lends some support to the careless, and it puts a duty of undefined character upon the vigilant to read something more than the signals themselves say. Here, further, two vessels, tug and tow, combined to falsify the message; yet they only share jointly and together the burden of liability which is placed equally on the vessel which has had the misfortune to rely on what they were saying. I think affirmance here is desirable for the good of our merchant marine" (*infra*, p. 27).

Even before the Collision Rules were effective as such this Court held that a vessel was entitled to assume that another vessel whose light she saw was what her light represented her to be and govern her navigation accordingly. *The Scotia*, 14 Wall (81 U. S.) 170.

In *Bradshaw* v. *The Virginia*, 4 Cir., 176 F. 2d 526, certiorari denied 338 U. S. 892, the Court said:

> "The failure to carry proper lights, required by the statutory rules of navigation, is one of the most recklessly unlawful faults a vessel can commit, and merits the severest condemnation. Waring v. Clarke, 5 How. 441, 46 U. S. 441" (p. 530).

To make the LADY NELSON divide the damages with the barge is hardly to subject the barge to "the severest condemnation." If it stands, the decision, as Clark, C. J., said, "will surely both confuse and burden our merchant marine" (*infra*, p. 25).

This Court does not appear to have considered, or given the inferior courts instruction in, the interpretation of the Rules for the Prevention of Collision since 1939.* We respectfully urge that this is an appropriate occasion.

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* *Postal Steamship Corp.* v. *El Isleo*, 308 U. S. 378.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE UNDERWOOD
Counsel for Petitioner.

New York, N. Y.
November 16, 1955.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 299 October Term, 1954

Argued April 13, 1955 Decided July 5, 1955

Docket No. 23223

LADY NELSON, LTD. and CANADIAN NATIONAL (WEST INDIES) STEAMSHIPS, LTD.,
Libelants-Appellees,

v.

CREOLE PETROLEUM CORPORATION and BARGE 75-8,
Claimant-Respondent-Appellant.

CREOLE PETROLEUM CORPORATION,
Cross-Libelant-Appellant,

v.

LADY NELSON, LTD. and CANADIAN NATIONAL (WEST INDIES) STEAMSHIPS, LTD.,
Cross-Respondents-Appellees.

Before CLARK, *Chief Judge*, and FRANK and HASTIE, *Circuit Judges.*

Appeals from the United States District Court for the Southern District of New York; GREGORY F. NOONAN, *District Judge.*

Appeals of BARGE 75-8 and its owner, Creole Petroleum Corporation, from decrees entered on a libel and cross libel finding this vessel and its tug solely responsible for a collision at sea between the barge and the steamship LADY NELSON. Reversed.

RAYMOND T. GREENE, New York City (KIRLIN, CAMPBELL & KEATING, IRA A. CAMPBELL and STEPHEN J. BUCKLEY, New York City, on the brief), for appellants.

EUGENE UNDERWOOD, New York City (BURLINGHAM, HUPPER & KENNEDY and H. BARTON WILLIAMS, New York City, on the brief), for appellees.

HASTIE, *Circuit Judge*:

A libel and cross libel have resulted in decrees determining fault and liability for ships' damage in a collision at sea. The appellants are one of the colliding vessels, BARGE 75-8, and its owner Creole Petroleum Company. The appellees and original libellants are the owners and operators of the steamship LADY NELSON, the other colliding vessel.

On this appeal the first question is whether the evidence justified the trial court's finding that due care was exercised in the navigation of the LADY NELSON. These are the relevant facts. The collision occurred on a dark but clear and calm night in the Gulf of Paria between the Island of Trinidad and the Venezuelan mainland. BARGE 75-8, some 150 feet in length, fully loaded and low lying, was being towed by a small fifty-foot tug from a Venezuelan port to Port of Spain, Trinidad. The barge was unlighted. The tug showed one white masthead light. The evidence justified a finding that the required second white light, which would have indicated a vessel with a tow, was either absent or so located or obscured as not to be observable by an

approaching vessel. It is clear that both the tug and the barge were negligent in their failure to show proper lights.

On the other hand the trial court found no fault in the navigation of the LADY NELSON. She was a four hundred foot passenger and cargo steamer outbound from Trinidad to Montreal. Some thirty minutes after dropping her pilot out of Port of Spain, she had just completed a maneuver to achieve the course upon which she proposed to traverse the Gulf of Paria. Steadying on that course and heading toward open sea at her normal cruising speed of about thirteen knots she saw a single light of another vessel ahead. At that time the captain and the mate were on the bridge. In their estimation the observed light was about two and one-half miles distant. Another witness for the LADY NELSON was a passenger named Goss who was forward on deck at all relevant times. Goss, a man with considerable nautical experience, said that he first saw the light in question at a distance of about four miles. Both the mate and Goss placed the light dead ahead. The master located it as bearing four degrees, less than half a point, on the port bow. Equally important, the mate, immediately after sighting the light ahead, made an observation with glasses and in that way was able to see both red and green side lights of the vessel ahead. Thereafter the LADY NELSON continued on course all the while observing ahead red and green side lights of another vessel approaching on such course as unmistakably to indicate an end on meeting. Goss indicated that this opposition of courses with both red and green lights visible continued until the vessels were only about three-fourths of a mile apart. He expressed his reaction to this situation by saying, "I was surprised to note how she still held directly on her course, which laid her directly into the course of the LADY NELSON". During all of this time, because of darkness, no outline of any object ahead could be seen. The testimony of the mate also shows that the LADY NELSON had a half mile of safe

water to starboard. However, the only reaction of her master to the developing situation was to order "nothing to port".

At this point, without regard to subsequent events, it is clear that the LADY NELSON already had committed serious fault: It is not disputed that the International Rules were applicable here. Article 18 provided that "When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other." 33 U. S. C. § 103. In addition, this Article explains that at night the visibility of both side lights of an approaching vessel indicates an end on meeting. And since "it is the risk of collision, not the collision itself, that masters must avoid," Ocean S. S. Co. of Savannah v. U. S., 2 Cir. 1930, 38 F. 2d 782, 784, the only debateable question as to fault here is whether "risk of collision" had developed as the vessels continued toward an end on meeting. In some circumstances the existence of such situation may be a doubtful question as to which reasonable appraisals may differ. In this case, however, we think it too clear for dispute that the LADY NELSON steered directly and knowingly to a risk of collision situation. In darkness, unable to see the outline of the approaching vessel, she persisted at undiminished cruising speed on a head on meeting course for some two miles until only about ten lengths separated the vessels. Her speed alone would have brought the vessels into collision within another two minutes. And she had no way of determining how much the speed of the other vessel would further shorten this interval within which manoeuvering was possible. The risk inherent in the characteristic first response of a large moving ship to a sudden putting over of the helm are too familiar to require elaboration.

The plain fact is that the LADY NELSON insisted on maintaining her own course, trying to impose upon the other

vessel alone the responsibility the law imposes on both to change course to starboard soon enough to avoid risk of collision. See The "America", 1875, 92 U. S. 432, 433. On the facts, therefore, we deem it a necessary finding that the LADY NELSON committed a serious fault of navigation by proceeding into risk of collision in disregard of her duty to change course and give way to starboard.

This brings us to a more difficult question. LADY NELSON did not collide with the tug of whose presence she was warned, but rather with its unlighted tow. The evidence shows that when the meeting ships were three-quarters of a mile apart the LADY NELSON observed the shutting out of the approaching vessel's green side light, an indication that she was making an appropriate change of heading toward safety, albeit a tardy one. In the meantime the LADY NELSON continued on her course leaving it to the other vessel to move far enough and fast enough to prevent mishap. Actually, when the two vessels came abeam, something less than a ship's length of open water separated them. Then for the first time, and too late for successful emergency maneuvering, it was observed from the bridge of the LADY NELSON that the tug was towing a barge. A few seconds later the LADY NELSON collided with the tow causing the damage to both colliding vessels which is the subject of this litigation.

In these circumstances it is necessary to consider whether the LADY NELSON was negligent in relation to the risk of such an accident as that which occurred. The controlling principle is a familiar one, clearly stated in a recent formulation by Professor Seavey: "If the reason why the defendant's act was negligent was that an injurious result might happen in a particular way or to a particular thing, he may not be liable if the event happens by different means or to a different subject matter." Seavey, Cogitations on Torts, 1954, 32. Cf. Palsgraf v. Long Island Ry., 1928, 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253. This

principle has been applied to maritime torts. The Eugene F. Moran, 1909, 212 U. S. 466; Diamond State Telephone Co. v. Atlantic Refining Co., 3d Cir. 1953, 205 F. 2d 402.

It is arguable, therefore, that the failure of the LADY NELSON to alter her course was negligent only in relation to the danger of collision with the tug itself; hence, in legal contemplation, she was not at fault in the collision with the tow. However, we think that argument views too narrowly the risks which give rise to the navigator's duty to give an approaching ship a wide berth, circumstances permitting. "The duty to keep out of the way * * * embraces the duty to keep away by a prudent and safe margin, having reference to all the contingencies of navigation * * *" The Aurania and the Republic, S. D. N. Y. 1886, 29 Fed. 98, 125. Such contingencies are numerous and varied. For examples, see The Majestic, 2d Cir. 1891, 48 Fed. 730; The Laura V. Rose, S. D. N. Y. 1886, 28 Fed. 104. At night they include uncertainty as to what may be ahead as well as how it will maneuver. More particularly, it is not so uncommon an experience as to be disregarded that the light of an invisible vessel ahead may indicate a hazard somewhat different from or greater than that disclosed by a mere reading of the light's conventional message. We regard this as one of the reasons for such giving way in a meeting situation as is required of both vessels by Article 18 of the International Rules. Therefore, if this risk eventuates in an accident which would have been avoided by compliance with the meeting rule, the occurrence is comprehended by the breach of duty. Cf. Robinson v. Detroit & C. Steam Nav. Co., 6th Cir. 1896, 73 Fed. 883.

This analysis imposes no new obligation and no unreasonable responsibility upon commerce. The duty of the navigator continues to be no more than normal compliance with the meeting rule. And liability for injury resulting from violation of that rule is imposed only for damage to a disclosed source of danger and things closely associated

with it. Tug and tow, as involved in this case, are perhaps the most obvious example of such association. Cf Robinson v. Detroit & C. Steam Nav. Co., supra at 73 Fed. 891. Indeed, so intimate is their relationship that for some purposes they are treated as a single legal unit. See Griffin, Collision, 1949, 411. Thus, responsibility is so limited with respect to both subject matter and physical area that owners and operators of ships are not subjected to any unfairly extensive or burdensome liability. And certainly there is nothing of commercial or other social consequence to be gained by excusing a navigator's disregard of the unqualified mandate of the meeting rule whenever it appears that compliance by the other ship alone will suffice to avoid the obvious danger. Compare the analysis in Judge Frank's dissenting opinion in Hentschel v. Baby Bathinette Corp., 2d Cir. 1954, 215 F. 2d 102, 105, 112.

Two other issues deserve mention. The appellants question the jurisdiction of the District Court over the barge in rem. But a stipulation for costs was filed on behalf of the barge and it was agreed that the answer of the owner in personam should also serve as answer in the proceeding in rem. In these circumstances, we think the court was empowered to adjudicate the liability of the barge in rem.

Creole Petroleum Corporation also complains of a finding that under the applicable law of Trinidad it bore a non-delegable responsibility for the proper lighting of its barge during towage. This finding of a rule of foreign law was based upon adequate proof and is entitled to stand.

It follows that damages must be divided. The decrees will be reversed and the cause remanded to the district court for further proceedings consistent with this opinion.

CLARK, *Chief Judge* (dissenting):

The findings of the district court showing that "[t]he officers and crew of the LADY NELSON were not negligent in any particular but on the contrary acted with the care and skill required of prudent navigators" seems to me strongly buttressed in the evidence. Upsetting them is contrary to the regard for admiralty findings expressed in McAllister v. United States, 348 U. S. 19; additionally this course must rest on certain premises as to navigation which will surely both confuse and burden our merchant marine.

Since the tug's one light denied the presence of a tow, and the towed barge was unlighted, no negligence can be attributed to the LADY NELSON for failing to see the barge in time to avoid the accident. Responsibility must therefore be predicated upon some unfulfilled duty owed the tug and in some manner transferred to the tow. Respondent's counsel have been rather successful in building up an atmosphere of a big vessel running down a little one and forcing the latter to give way on pain of being hit. But I am quite clear that on the facts as they existed and were found, the claim is specious and unfounded.

Before I turn to the fact findings let me try to put this issue of "close-shaving" in its proper perspective as it came before the trial court. Respondent had some six or seven claims ranging from the jurisdiction of the court in admiralty to certain issues of fact. Most stressed of these issues was the alleged failure of the LADY NELSON's lookout to report the barge; nearly as much was made of her claimed failure to make proper use of her radar equipment. The trial court properly found against respondent on them, and they are not adverted to in the opinion. The claim of close shaving was actually based upon the deposition of the tug's master, Fuentes, that the LADY NELSON "changed her course" to pass on the port side very close to his vessel. But this contention of change of course was discredited in the evidence and not accepted by the trial

court, which found that the LADY NELSON "continued on without change of course." It also found that the vessels passed "port to port, without incident or difficulty, at a distance of about one shiplength" or over 400 feet. The trouble came thereafter from the unlighted low-lying barge in the wake of the tug.

In view of these well supported findings it would seem doubtful that the LADY NELSON could properly be held liable even if we accept the picture of inconsiderate navigation limned in the opinion. For she has completely fulfilled her obligation of 33 U. S. C. § 103 of navigating with respect to an approaching vessel "so that each may pass on the port side of the other." But in truth this picture was not the one before the trial court, as was shown by the straightforward testimony of her master and mate, supported by the deposition of the disinterested witness Goss. After the LADY NELSON steadied on her course for the open sea, her master and mate first saw the tug's single white light. This told little, since indeed it might have been the stern of a vessel. But close observation discovered the other lights of the tug and enabled the master to deduce correctly that approaching was a small steam vessel. There surely was then no occasion for him to swerve off his course for fear of some misnavigation on the part of the approaching vessel. What he did was quite properly to order the quartermaster "not to allow anything to the port of the course" or "in other words, not to allow the ship to fall off to the left of her course." (This is the direct testimony of Vaughan, the mate.) So she was held carefully to her course and so passed port to port safely and without incident as we have seen. What more should she have done? The holding otherwise seems somewhat as though a large car approaching a small Ford on a broad highway must climb the greensward to its right for fear there may be an unlighted trailer to the Ford which may get in its path.

Some point is made that the tug when three-quarters of a mile away made a change of heading to starboard and toward safety while the LADY NELSON continued on her course, leaving it to the other vessel to move out of danger. This seems to me an unjustified deduction; yielding of the course by the tug would seem an appropriate, though unduly belated, action to get its unlighted tow out of the way of trouble if possible. It knew of the danger as the other vessel did not. Thus there is nothing to show that the LADY NELSON's course was not circumspect and appropriate, as her successful passing of the tug demonstrates. Point is also made of her speed; but this, too, seems appropriate for a passenger vessel in the open sea. The desirability of maintaining schedules is, or should be, obvious in this age of competition for passenger carriage.

The safe navigation of ships, particularly at night, must depend on the trustworthiness of signals, known to mariners and set by law. Any holding which weakens their validity or indeed falsifies their message is disturbing. It lends some support to the careless, and it puts a duty of undefined character upon the vigilant to read something more than the signals themselves say. Here, further, two vessels, tug and tow, combined to falsify the message; yet they only share jointly and together the burden of liability which is placed equally on the vessel which has had the misfortune to rely on what they were saying. I think affirmance here is desirable for the good of our merchant marine.

Article 18 of the International Rules for the Prevention of Collisions at Sea. Title 33, U. S. C. A., § 103.

When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

This article only applies to cases where vessels are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two vessels which must, if both keep on their respective courses, pass clear of each other.

The only cases to which it does apply are when each of the two vessels is end on, or nearly end on, to the other; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own; and by night, to cases in which each vessel is in such a position as to see both the side lights of the other.

It does not apply by day to cases in which a vessel sees another ahead crossing her own course; or by night, to cases where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

FILED
DEC 12 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 536.

LADY NELSON, LTD., and CANADIAN NATIONAL (WEST INDIES) STEAMSHIPS LTD.,
Petitioners,
against
CREOLE PETROLEUM CORPORATION and BARGE 75-8,
Respondents.

CREOLE PETROLEUM CORPORATION,
Respondent,
against
LADY NELSON, LTD., and CANADIAN NATIONAL (WEST INDIES) STEAMSHIPS LTD.,
Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION.

We submit that there is no more accurate account of the navigation of the *Lady Nelson* than that set forth in the majority opinion of the Court of Appeals, wherefrom we quote:

> "She [the *Lady Nelson*] was a four hundred foot passenger and cargo steamer outbound from

Trinidad to Montreal. Some thirty minutes after dropping her pilot out of Port of Spain, she had just completed a maneuver to achieve the course upon which she proposed to traverse the Gulf of Paria. Steadying on that course and heading toward open sea at her normal cruising speed of about thirteen knots she saw a single light of another vessel ahead. At that time the captain and the mate were on the bridge. In their estimation the observed light was about two and one-half miles distant. Another witness for the *Lady Nelson* was a passenger named Goss who was forward on deck at all relevant times. Goss, a man with considerable nautical experience, said that he first saw the light in question at a distance of about four miles. Both the mate and Goss placed the light dead ahead. The master located it as bearing four degrees, less than half a point, on the port bow. Equally important, the mate, immediately after sighting the light ahead, made an observation with glasses and in that way was able to see both red and green side lights of the vessel ahead. Thereafter the *Lady Nelson* continued on course all the while observing ahead red and green side lights of another vessel approaching on such course as unmistakably to indicate an end on meeting. Goss indicated that this opposition of courses with both red and green lights visible continued until the vessels were only about three-fourths of a mile apart. He expressed his reaction to this situation by saying, 'I was surprised to note how she still held directly on her course, which laid her directly into the course of the *Lady Nelson*'. During all of this time, because of darkness, no outline of any object ahead could be seen. The testimony of the mate also shows

> that the *Lady Nelson* had a half mile of safe water to starboard. However, the only reaction of her master to the developing situation was to order 'nothing to port.'" (Appendix to petition, pp. 20-21)

This recitation of facts by the Court of Appeals neither purports to nor does it in any way alter the material facts as to the navigation of the *Lady Nelson* as found by the District Court.

It was upon these facts that the Court of Appeals concluded that the *Lady Nelson* was navigated in violation of Article 18 of the International Rules and that such statutory violation did contribute to the collision. There was no specific finding of the District Court on this point.

There have been no attempts by the Court of Appeals in this case to overrule or in any way negate the principle of tort law set forth in Reason I of the petition. The principle enunciated in *The Eugene F. Moran,* 212 U. S. 466, was recognized by the court in that case, as it was in the case of the *Lady Nelson.* In accord with the facts in *The Eugene F. Moran,* the court eventually held that the principle did not apply. Likewise has the Court of Appeals in this matter decided that under the existing facts the principle does not apply. This case accordingly presents no new statement of a principle of law, but rather an analysis of a set of facts to determine whether or not the existing principle of law is applicable. In both this case and *The Eugene F. Moran,* the courts have held that the statutory duty was not imposed for the purpose of preventing consequences as narrowly defined as advocated by petitioner.

The Robins Dry Dock & Repair Co. v. *Flint,* 275 U. S. 303, case, cited in support of this same point, is entirely inapplicable inasmuch as that case turns upon a contractual relationship which is entirely non-existent in this case. The third case relied upon by the petitioner is the *Diamond State Tel. Co.* v. *Atlantic Refining Co.,* 205 F. 2d 402, involving a collision which was determined upon the particular facts existing therein and which enunciated no principle in conflict with the opinion of the Court of Appeals in this case.

The cases cited in Reason II of the petition are entirely irrelevant. Those cases present factual situations wherein a vessel properly navigated and observing the Rules of the Road is suddenly confronted with some unlighted vessel with which she collides. The facts of this case are entirely apart from any such set of circumstances. Herein, as has been found by the Court of Appeals, the *Lady Nelson,* being navigated in violation of a statutory requirement, came upon an unlighted barge with which she collided. The responsibilities and eventual liability in these two entirely different types of cases is quite apparent.

Counsel's attempt to argue the *Lady Nelson's* violation of Article 18 is an attempt at fallacious reasoning. In effect, they argue that risk of collision would never exist unless it be followed by actual collision. That the *Lady Nelson* did avoid the tug is not proof that risk of collision did not exist at some prior time as between the two vessels. When two vessels are in such relative position one to the other as were the *Lady Nelson* and the tug herein, it is inevitable that a condition of some danger will ensue if no avoiding action

be taken by one or the other. It is the failure to avoid this risk for which the Court of Appeals found the *Lady Nelson* liable.

The five factual cases set forth in support of Reason III of the petition are entirely inapplicable and in no way support the conclusion advocated by counsel. Each of these cases involved a set of circumstances entirely foreign to those of this case and further each of the five cases was governed by rules of navigation other than Article 18 and accordingly should in no way be quoted as proper authorities for the interpretation of Article 18.

We submit that the Court of Appeals had no intention to and did not change the facts as found by the District Court relevant to the navigation of the *Lady Nelson* and accordingly did not violate the doctrine of *McAllister* v. *United States,* 348 U. S. 19. Counsel are at this late date attempting to argue what the word "soon" signified in the District Court findings (Findings 4-5, R. 124). In this argument counsel now attack the credibility of one of their own witnesses heretofore most strenuously championed. The "soon" of the District Court's findings, is more fully understood when reference is made to the more complete recitation of the facts by the Court of Appeals quoted *supra.*

Reason V for granting the petition is, to say the least, startling inasmuch as this is the first time that such a contention has been made in this case. Petitioner at no time pleaded nor advocated that the rules of navigation, namely the International Rules, were to be interpreted by our courts only in accord with prevailing British opinions. We submit that this

is apparently an attempt to reargue the merits of the case under an entirely different tack.

The worst criticism dissenting Judge Clark had of the majority opinion was that it was too severe. This position is amazing in this day of mammoth high speed ships when the general tenor of our admiralty courts has been for a more exacting observance of the Rules of the Road. Apparently Judge Clark wants to make the observance of these rules so loose they will retain little merit as evidenced by his remark that the reasonableness of the speed of a vessel is to be determined—at least in part—by the fact that she must maintain a schedule fixed by his owners. Whatever may be Judge Clark's opinions on the subject, neither the maritime industry of the country nor the United States Coast Guard has ever advocated anything but the strictest adherence to these rules.

The issue in the present case is entirely factual and no amount of strained semantics can convert it into one warranting review by this court on certiorari. This case was but a simple application of facts therein to already well established legal principles. For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 12, 1955.